

CENTRAL ILLINOIS PUBLIC SERVICE  
COMPANY d/b/a AmerenCIPS,

Complainant,

v.

COLES-MOULTRIE ELECTRIC  
COOPERATIVE, INC.,

Respondent.

Docket No: 03-0723

**COMPLAINANT'S RESPONSE  
TO COLES-MOULTRIE ELECTRIC COOPERATIVE'S REPLY  
TO COMPLAINANT'S MOTION TO RECONSIDER COMPLAINANT'S MOTION  
FOR JUDGMENT ON COUNT I OF COMPLAINT  
UNDER THE ELECTRIC SUPPLIER ACT**

ILLINOIS  
COMMERCE COMMISSION  
2005 MAR 22 PM 3:11  
CHIEF CLERK'S OFFICE

NOW COMES Complainant Central Illinois Public Service Company d/b/a AmerenCIPS ("CIPS"), by and through its attorneys, Brown, Hay & Stephens, LLP, Scott C. Helmholz and Donald L. Woods, and hereby files its Response to Coles-Moultrie Electric Cooperative, Inc.'s ("CMEC") Reply to CIPS' Motion to Reconsider CIPS' Motion for Judgment on Count I of the Complaint Under the Electric Supplier Act. CIPS requests that the Administrative Law Judge reconsider the denial of its Motion for Judgment on Count I of its Complaint and that the Commission dismiss this case for want of jurisdiction pursuant to 83 Ill.Adm.Code 200.190.

**I. Background and Procedural History**

On November 3, 2003, CMEC delivered to CIPS a purported notice ("Notice"), pursuant to Section 7 of the ESA, of its intent to provide electric service to "a commercial business park called Coles Centre Business Park . . . located in the southwest quadrant of the intersection of Illinois Route 16 and Lerna Road in Section 21, Township 12 North, Range 8 East, of the Third Principal Meridian in Coles County, Illinois." (See Compl., Ex. 1).

On November 19, 2003, CIPS filed a Complaint, pursuant to Section 7 of the ESA, seeking, in Count I, an order of the Illinois Commerce Commission (the "Commission") finding CMEC's purported Notice to be null and void and of no force and effect within the meaning of Section 7 of the ESA and concluding that this matter ought to be dismissed.

On March 3, 2004, CIPS filed a Motion for Judgement on Count I of the Complaint arguing, *inter alia*, that CMEC's Notice was null and void and of no force and effect because the potential customer described in Ex. 1 of Complaint had not made any request to CMEC for the actual delivery of electric service and that, until CMEC received and accepted an actual request for delivery of electric service, there was no actual case or controversy, and CMEC's purported Notice was premature and would require the Commission, pursuant to Section 8, to pass judgment on mere abstract propositions of law or render an advisory opinion.

On April 5, 2004, CMEC filed a Reply to CIPS' Motion, arguing, *inter alia*, that a motion for judgement on the pleadings must fail where the record shows that there exists a material issue of fact and that here, there was a material issue of fact because CIPS had asserted that a customer had not made a request for electric service, and CMEC had denied that assertion in its answer. CMEC went on to assert that time was of the essence in this matter because the customer had requested that electric service be installed by the second quarter of 2004. (CMEC Reply at 2-3).

Following the filing of the above-referenced pleadings, this matter came on for hearing on April 13, 2004. Arguments of counsel were heard, and, after considering the arguments and pleadings, the Administrative Law Judge ruled as follows:

JUDGE SAINSOT: You know, I'm going to deny your motion, Mr. Helmholtz, and I'll tell you why. I'm not saying that you might not be correct some where down the line. You may very well be factually correct, but I don't have evidence that you're correct. I have allegations, and we are, at this point I think, engaged in semantics. Whether the answer to Count 1, you know -- there's a line here in Paragraph 5,

CMEC further states that such notice was given to CIPS as a result of a request to provide a written proposal for electric service from Agracel, Inc., for the aforesaid Coles Centre Business Park. You know, whether that -- what you're asking me to do is rule as a matter of law that that request didn't have contractual validity; it was a precursor to a contractual situation, and I'm not prepared to do that now because I don't have enough evidence to do so. (Tr. at 19.)

On January 11, 2005, CIPS filed a Motion to Reconsider the ALJ's ruling. The Motion to Reconsider asserted that materials provided by CMEC in discovery proved that CMEC had not obtained a request for service as that matter had been defined by the Commission in ESA1 and 2; its Section 7 Notice was premature; there was no case or controversy before this body and; Complainant's Motion for Judgment on Count I should be granted and this matter dismissed.

On March 10, 2005, CMEC filed its Reply to CIPS' Motion to Reconsider. Attached to the Reply is a copy of a document captioned "COLES-MOULTRIE ELECTRIC COOPERATIVE AGREEMENT FOR PURCHASE OF ELECTRIC POWER". The document, which is dated March 9, 2005, (two days before the Reply was filed) apparently reflects a power purchase agreement between CMEC and Agracel, Inc.

## **II. Argument**

While CIPS made a number of legal arguments in its Motion to Reconsider, the primary point was that in dockets ESA 1 and 2, (Order entered March 8, 1966), the Commission had established, as a condition precedent to the issuance of a Section 7 Notice, the requirement that a contract be in place between the electric supplier and the customer, while in the instant case, the record demonstrated that no contract was in place, making the purported Section 7 notice of intent to serve premature.

CMEC's Reply to CIPS' Motion to Reconsider, with the attached "COLES-MOULTRIE ELECTRIC COOPERATIVE AGREEMENT FOR PURCHASE OF ELECTRIC POWER," is simply an admission by CMEC that, under ESA 1 and 2, its Section 7 notice was premature. CMEC has now tried to "mend its hold" by backfilling the record, after wasting almost a year and a half of the time and effort of CIPS and the Commission. CMEC's practice should not be encouraged by the ALJ now recognizing the legal effect of the eleventh hour contract between CMEC and Agracel. Instead, the Commission should dismiss this entire docket and require CMEC to provide a legal Section 7 notice, which would restart the 20 day clock for CIPS to file its complaint. Any other outcome will simply encourage further wrongful behavior, with the ensuing wasted time and effort of other parties and the Commission.

In the event the ALJ decides to reward CMEC's behavior by allowing this matter to go forward in its current posture, CIPS offers the following. CIPS believes that Agracel's contract with CMEC may bring this matter within the "customer choice" rubric of Coles-Moultrie v Electric Cooperative v. Illinois Commerce Commission, 131 Ill. App.3d 946, 476 N.E.2d 1313, 87 Ill.Dec. 311, (4<sup>th</sup> Dist, 1985) ("Sukup"), where the court, in interpreting Section 14 of the ESA, held that where two competing electric suppliers hold municipal franchises covering the same geographic area, customers located in the area may choose their suppliers. Sukup, however, left open the question of the effect of municipal franchises on electric supplier rights under Section 5 of the ESA. CIPS' Complaint asserts that it possesses Section 5 rights to a portion of the tract now proposed as the Coles-Moultrie Business Center. In the event the Commission fails to dismiss this matter in its entirety and require CMEC to issue a legal Section 7 Notice, CIPS intends to pursue its Section 5 rights under the ESA.

### III. Conclusion

In conclusion, the Commission should grant CIPS' Motion to Reconsider and enter an Order dismissing this docket because CMEC has now admitted that its purported Section 7 notice was premature and without legal effect. Any other outcome will simply reward and encourage CMEC's dilatory and obstructionist behavior to the detriment of CIPS and the Commission.

**CENTRAL ILLINOIS PUBLIC SERVICE COMPANY**  
**d/b/a AmerenCIPS, Complainant,**

By:   
One of Its Attorneys

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**PROOF OF SERVICE**

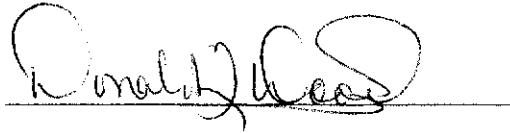
The undersigned hereby certifies that a copy of the foregoing *Response to Coles-Moultrie Electric Cooperative, Inc.'s ("CMEC") Reply to the Motion to Reconsider Complainant's Motion for Judgment on Count I of the Complaint Under the Electric Supplier Act* was served upon:

Claudia Sainsot, Esq.  
Administrative Law Judge  
Illinois Commerce Commission  
160 North LaSalle, Suite C-800  
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Mr. Ron Linkenback  
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527 East Capitol  
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by enclosing the same in an envelope addressed to such attorney at his/her address as disclosed by the pleadings of record herein, with postage prepaid, and by depositing said envelope in a U.S. Post Office box in Springfield, Illinois, on this 22<sup>nd</sup> day of *March, 2005*.

A handwritten signature in dark ink, appearing to read "Donald J. Keas", is written over a horizontal line.

March 22, 2005\ers\F:\WORD\SCHLIEN\AMEREN\COLES-MOULTRIE\SURREPLYTOMOTIONTORECONSIDER.DOC